Supreme Court, U.S.
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No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., on behalf of GILBERT F., a minor,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the 1997 Amendments to the Individuals with Disabilities Education Act ("IDEA") created a categorical bar excluding children who have not previously attended a public school, and whose public school districts have failed to provide them with a free and appropriate public education, from receiving the long-established tuition-reimbursement remedy created by the IDEA and this Court's decisions in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) ("*Carter*") and *School Committee of Burlington, Mass v. Department of Education*, 471 U.S. 359 (1985) ("*Burlington*").

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iv

Counter-Statement of the Case 1

Factual Background and Proceedings Below 2

A. Mr. F. and Gilbert Provide Appropriate Notice and Participate in the Board's Attempts to Develop Appropriate IEPs and to Provide FAPE to Gilbert 2

B. The Impartial Hearing Officer Applies *Carter* and *Burlington* and Orders the Board to Reimburse Mr. F. for Gilbert's Gaynor Tuition 4

C. The State Review Officer Affirms the Decision of the Impartial Hearing Officer, Finding that Mr. F. "is Entitled to Reimbursement" 5

D. The District Court Declines to Review the Record and Rules as a Matter of Law that 20 U.S.C. § 1412(a)(10)(C)(ii) Precludes Reimbursement 6

Contents

Page

E. The Second Circuit, in a Summary Order, Vacates and Remands to the District Court for Further Proceedings 7

Reasons for Denying the Petition 7

A. The Second Circuit's Decision Followed this Court's Precedent 8

B. There is No Circuit Conflict 15

1. *Frank G.* (Second Circuit) does not conflict with *Amy N.* (First Circuit) . . . 15

2. *Frank G.* (Second Circuit) agrees with *M.M.* (Eleventh Circuit) 18

C. This Case is an Improper Vehicle for Supreme Court Review 20

D. Petitioner's Spending Clause Argument is Waived Because it Was Not Raised Below and is Meritless 22

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

CASES:

Berger v. Medina City Sch. Dist.
348 F.3d 513 (6th Cir. 2003) 14

Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley
458 U.S. 176 (1982) 8

Board of Educ. v. Tom F.
05-0566, 2006 U.S. App. LEXIS 20961
(2d Cir. Aug. 9, 2006) .....*passim*

Board of Educ. v. Tom F.
No. 01 Civ. 6845, 2005 WL 22866
(S.D.N.Y. Jan. 04, 2005) .....*passim*

E.W. and E.W., ex rel. J.W. v. Sch. Bd. of Miami-Dade County
307 F. Supp. 2d 1363 (S.D. Fla. 2004) 12

Evans v. Dist. No. 17
841 F.2d 824 (8th Cir. 1988) 14

Florence County Sch. Dist. Four v. Carter
510 U.S. 7 (1993) .....*passim*

Frank G. v. Bd. of Educ.
459 F.3d 356 (2d Cir. 2006) .....*passim*

Cited Authorities

Page

Greenland Sch. Dist. v. Amy N.
358 F.3d 150 (1st Cir. 2004) 15, 16, 17, 18, 20

Honig v. Doe
484 U.S. 305 (1988) 19

Illinois State Bd. of Elections v. Socialist Workers Party
440 U.S. 173 (1979) 21

Justin G. ex rel. Gene R. v. Bd. of Educ. of Montgomery County
148 F. Supp. 2d 576 (D. Md. 2001) 12

M.C. ex rel. Ash v. Lake Oswego Sch. Dist., No. 7J
980 F.2d 585 (9th Cir. 1992) 14

M.C. ex rel Mrs. C. v. Voluntown Bd. of Educ.
226 F.3d 60 (2d Cir. 2000) 14

M.M. v. Sch. Bd. of Miami-Dade County
437 F.3d 1085 (11th Cir. 2006) 18, 20

Schaffer v. Weast
546 U.S. 49, 126 S. Ct. 528 (2005) 22

School Comm. of Burlington v. Dep't of Educ.,
471 U.S. 359 (1985) ..... *passim*

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002) 22

Cited Authorities

Page

TRW, Inc. v. Andrews,
534 U.S. 19 (2001) 22

Webster v. Fall,
266 U.S. 507 (1925) 21

Statutes:

20 U.S.C. § 1400(d)(1) 2, 8

20 U.S.C. § 1412 ..... 3, 12

20 U.S.C. § 1412(a)(10) ..... *passim*

20 U.S.C. § 1412(a)(6) 9

20 U.S.C. § 1415 ..... 12, 14

20 U.S.C. § 1415(i)(2) 6

20 U.S.C. § 1415(i)(3) 22

34 C.F.R. § 300.24 19

34 C.F.R. § 300.403 ..... 13, 16

N.Y. Educ. Law § 4404(1) 3

COUNTER-STATEMENT OF THE CASE

Petitioner, the Board of Education of the City School District of the City of New York (the "Board"), asks this Court to exercise its certiorari jurisdiction to consider, and ultimately to overturn, a Summary Order issued by the United States Court of Appeals for the Second Circuit.

As an initial matter, this case provides no basis for this Court's review. Summary Orders are without precedential value in the Second Circuit. *See* Second Circuit Local Rule 0.23(b) ("Rulings by summary order do not have precedential effect."). No other court may rely upon the Second Circuit's decision. Therefore, it is definitionally impossible for this case to create a conflict among the lower courts.

Moreover, the Second Circuit's decision—that the 1997 Amendments to the IDEA do *not* create a categorical bar excluding children who have not previously attended a public school from receiving, in appropriate cases, the long-established tuition-reimbursement remedy created by the IDEA, *Carter*, and *Burlington*—relies on well-established precedent. Petitioner has not and cannot cite any conflicting opinion in the lower courts.

In *Burlington*, this Court held that Congress did not intend that parents such as Mr. F. would have to subject their children to inappropriate educational placements in order to secure the right to reimbursement under the IDEA. 471 U.S. at 370. Because the Second Circuit's decision applied *Burlington* and its progeny correctly, and because there is no conflict among the relevant decisions of the courts of appeals, the Board's petition for a writ of certiorari must be denied.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A. Mr. F. and Gilbert Provide Appropriate Notice and Participate in the Board's Attempts to Develop Appropriate IEPs and to Provide FAPE to Gilbert

Mr. F. is the father of Gilbert, a child with a learning disability who was born on October 1, 1989. Mr. F. and Gilbert reside in New York City. In the fall of 1995, Mr. F. enrolled Gilbert at the Stephen Gaynor School ("Gaynor"), a private school that specializes in educating children with Gilbert's learning disabilities, and the school at which Gilbert's older brother, who had similar learning disabilities, had been successfully educated.

In 1996, Mr. F. properly invoked Gilbert's right under the IDEA to receive special educational services from the Board by requesting that Gilbert be evaluated and provided with an Individualized Education Program ("IEP"). Under the IDEA, the Board is a "local educational agency" responsible for evaluating children with disabilities residing within its district and providing them with a free and appropriate public education ("FAPE"). *See* 20 U.S.C. §§ 1400(d)(1), 1404(15)(A) & 1412(a)(3)(A).

In 1997 and 1998, Gilbert was evaluated by representatives of the Board, and Mr. F. and Gilbert fully cooperated with the Board as it developed an IEP for Gilbert. In both 1997 and 1998, however, the IEPs proposed by the Board were inadequate to meet Gilbert's special education needs. Consequently, in accordance with the remedies set forth in the IDEA, *Carter*, and *Burlington*, Mr. F. petitioned for reimbursement of Gilbert's Gaynor tuition for those years.

See generally 20 U.S.C. § 1412 (providing procedures whereby parents may challenge inappropriate IEPs and obtain reimbursement for the costs of an appropriate placement). In both 1997 and 1998, the Board agreed to pay for the cost of Gilbert's education at Gaynor.

In the spring of 1999, Gilbert was once again evaluated by the Board's representatives, and again Mr. F. and Gilbert fully cooperated as another IEP was developed. In June 1999, the Board proposed an IEP, but recommended no specific placement for Gilbert—that is, the Board failed at that time to identify which public school would implement Gilbert's IEP and meet his educational needs. On July 31, 1999, just a month prior to the beginning of the school year, Mr. F. was advised that Gilbert would be placed at P.S. 871.

Mr. F., believing the proposed placement to be inappropriate, exercised his right under N.Y. Educ. Law § 4404(1) and requested an impartial review to determine the appropriateness of the placement. In the meantime, the school year was beginning, and Gilbert remained enrolled at Gaynor for the 1999-2000 school year.

While the Board's brief repeatedly asserts that it provided FAPE to Gilbert (*see, e.g.*, Br. of Pet. at 8), both administrative tribunals that reviewed the extensive factual record held that the Board had *failed* to demonstrate that its proposed placement was appropriate to serve Gilbert's needs. The District Court, which ruled as a matter of law that Gilbert was not entitled to pursue a reimbursement remedy, never considered the facts or made a determination as to whether the Board had provided FAPE.

B. The Impartial Hearing Officer Applies *Carter* and *Burlington* and Orders the Board to Reimburse Mr. F. for Gilbert's Gaynor Tuition

A lengthy hearing on Mr. F.'s petition for reimbursement was held before an impartial hearing officer on January 21, January 31, and February 29, 2000. The Hearing Officer heard testimony from both Mr. F. and from Board representatives.

Applying the first prong of the standard set forth by this Court in *Burlington*, 471 U.S. 359 (1985), and *Carter*, 510 U.S. 7 (1993), to evaluate whether a parent is entitled to reimbursement for a private school placement, the hearing officer determined that the proposed program at P.S. 871 was inappropriate and insufficient to serve Gilbert's needs.

Applying the second prong of the *Carter/Burlington* test, which requires an inquiry into whether the private placement is appropriate for the child, *Carter*, 510 U.S. at 12-13; *Burlington*, 471 U.S. at 370, the hearing officer reviewed the Gaynor program and determined that it was suitable for Gilbert's needs.

Finally, applying the third prong of the test—which requires a reviewer to balance the equities and determine whether they favor reimbursement—the officer found that the equities favored reimbursement to Mr. F., who "did everything asked of him by the Board of Education in regard to this matter." Case No. 37710, Bd. of Educ. of the City of New York, Impartial Hearing Office, at 13 (Apr. 6, 2000). Accordingly, the hearing officer ordered the Board to reimburse Mr. F. for Gilbert's tuition at Gaynor for the 1999-2000 school vear.

C. The State Review Officer Affirms the Decision of the Impartial Hearing Officer, Finding that Mr. F. "is Entitled to Reimbursement"

The Board applied for review of the hearing officer's decision to the New York State Education Department. On March 30, 2001, a State Review Officer ("SRO") affirmed the hearing officer's decision and his reasoning under each prong of the *Carter/Burlington* analysis.

The SRO, citing *Burlington*, stated that "[a] board of education may be required to pay for educational services obtained for a student by his or her parent if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim." Application of the Board of Educ. of the City Sch. Dist. of the City of New York, No. 00-031, The State Educ. Dep't, State Review Officer, at 5 (Mar. 30, 2001).

The SRO then "determined that the Board of Education failed to demonstrate the appropriateness of its recommended program," that Mr. F. had shown that Gaynor was an appropriate placement for Gilbert, and that "equitable considerations support [Mr. F.]'s claim that he is entitled to reimbursement for the cost of [Gilbert's] tuition at Gaynor for the 1999-2000 school year." *Id.* at 5-6.

Finally, the SRO addressed the argument the Board now asserts in its petition for certiorari, noting that "[t]he Board of Education contends that respondent is barred from receiving an award of tuition reimbursement because his son has not received special education services from a public agency. It relies upon the provisions of 20 U.S.C. § 1412(a)(10)(C)(ii)." *Id.* at 6. This argument, the SRO noted, "has been considered and rejected in prior appeals." *Id.* It was rejected in this instance as well.

D. The District Court Declines to Review the Record and Rules as a Matter of Law that 20 U.S.C. § 1412(a)(10)(C)(ii) Precludes Reimbursement

The Board appealed the administrative decisions to the United States District Court for the Southern District of New York on or about July 26, 2001. *See* 20 U.S.C. § 1415(i)(2)(A). Both sides moved for summary judgment and briefing was completed by July 2002. In January 2005, the District Court granted the Board's motion for summary judgment, reversing the decisions of the two administrative tribunals.

The District Court never reviewed the extensive evidentiary record or the decisions of the lower tribunals holding that the Board's proposed placement was inadequate to meet Gilbert's educational needs. Instead, the Court held that Mr. F. was precluded as a matter of law from claiming reimbursement for Gilbert's educational expenses because Gilbert had never received special education and related services from a public agency. *See Board of Educ. v. Tom F.*, No. 01 Civ. 6845, 2005 WL 22866 (S.D.N.Y. Jan. 04, 2005) ("*Tom F.*").

The District Court based its opinion on 20 U.S.C. § 1412(a)(10)(C)(ii), which was added to the IDEA in 1997. Specifically, the District Court found that this provision categorically bars parents from seeking reimbursement for a child's educational expenses where the child has never attended a public school. *Tom F.*, 2005 WL 22866, at *3.

E. The Second Circuit, in a Summary Order, Vacates and Remands to the District Court for Further Proceedings

Mr. F. appealed the decision of the District Court to the United States Court of Appeals for the Second Circuit. On August 9, 2006, the Second Circuit disposed of the case by summary order, declaring only that "the judgment of the district court be, and hereby is, VACATED and REMANDED for further proceedings in light of this Court's decision in *Frank G. v. Board of Educ.*, No. 04-4981, __ F.3d __ (2d Cir. July 27, 2006)." *Board of Educ. v. Tom F.*, 05-0566, 2006 U.S. App. LEXIS 20961 (2d Cir. Aug. 9, 2006) ("*Tom F.*"). On August 28, 2006, the Board sought a stay of mandate from the Second Circuit in order to file a petition for certiorari with this Court. The stay was granted, and on November 1, 2006, the Board filed its certiorari petition.

REASONS FOR DENYING THE PETITION

The Board's petition for a writ of certiorari does not set forth any argument that would justify this Court's exercise of its certiorari jurisdiction. *See* SUP. CT. R. 10. The Second Circuit's issuance of a non-precedential Summary Order cannot form the basis for review by this Court, because by definition it cannot be relied upon by lower courts. This Court should decline to grant certiorari on this basis alone.

Moreover, the Second Circuit's decision—that the 1997 Amendments to the IDEA do *not* create a categorical bar excluding children who have not previously attended a public school from receiving, in appropriate cases, the long-established tuition-reimbursement remedy created by the IDEA, *Carter*, and *Burlington*—is fully consistent with this

Court's precedent, *see* SUP. CT. R. 10(c), and does not conflict with decisions of the other federal courts of appeals, *see* SUP. CT. R. 10(a). In addition, this case does not present an important question of federal law that is ripe for review by this Court.

A. The Second Circuit's Decision Followed this Court's Precedent

Over twenty years ago, this Court considered the statutory language of the IDEA in conjunction with its underlying policy goals and Congress' stated purposes, and held that children with disabilities were not required to continue in inappropriate placements under inadequate IEPs while their parents challenged school districts' denials of FAPE. *Burlington*, 471 U.S. at 370.

In refusing to accept Petitioner's argument that the statutory language of the IDEA categorically bars tuition reimbursement to parents of children who have not previously attended a public school, the Second Circuit properly ruled that the 1997 Amendments to the IDEA must be read with, not against, this Court's analysis in *Burlington*.

Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1). As this Court has recognized, the foundation of this educational endeavor is the development of an IEP for each child with a disability. *See Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 205-206 (1982).

Ideally, a child's parents and a team of public school officials collaborate to produce an appropriate IEP, which can be implemented to provide FAPE. But Congress knew that this would not invariably occur, so it provided procedures whereby parents who disagree with a proposed IEP can place their child in an appropriate private school, inform the school district that they are rejecting the IEP, and challenge the district's provision of FAPE in a due process hearing. 20 U.S.C. §§ 1412(a)(6)(A) & 1415(a)-(o).

If parents successfully challenge a proposed IEP and a private school placement is deemed appropriate to meet their child's special education needs, "a court or a hearing officer may require [the public school district] to reimburse the parents for the cost of that [private school] enrollment. . . ." 20 U.S.C. § 1412(a)(10)(C)(ii). This provision for retroactive reimbursement was enacted in response to this Court's decision in *Burlington*.

In *Burlington*, this Court made clear that the IDEA provides courts with broad discretionary power to order reimbursement of private education costs for children with disabilities who have not been provided with FAPE. *Burlington*, 471 U.S. at 369. In *Burlington*, this Court rejected a scenario in which parents of children with disabilities would be faced with a Hobson's Choice—"go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Id.* at 370. Congress, this Court found, "undoubtedly did not intend this result." *Id.*

In 1997, during a round of amendments to the IDEA, the following language was added:

> If the parents of a child with a disability, who previously received special education and related

> services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii). The District Court cited this language in holding that Mr. F. was precluded from seeking reimbursement for Gilbert's educational expenses because Gilbert had never attended public school. *Tom F.*, 2005 WL 22866, at *3.

Relying upon the District Court's reasoning, the Board argued on appeal that prior public school attendance is a prerequisite to any future private school reimbursement under the IDEA. As the Second Circuit characterized this argument, the Board argued that "[o]nly after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement." *Frank G. v. Board of Educ.*, 459 F.3d 356, 367 (2d Cir. 2006), *pet. for cert. filed*, No. 06-580 2006 WL 3075196, 75 USLW 3248 (U.S. Oct 23, 2006) (Oct. 23, 2006) ("*Frank G.*")

In *Burlington*, however, this Court rejected a reading of the IDEA under which:

> *parents are forced to leave the child in what may turn out to be an inappropriate educational*

> *placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement.* The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.

Burlington, 471 U.S. at 372 (emphasis added).

Interpreting the statutory language through the lens of *Burlington*, the Second Circuit found that such a forced inappropriate placement led to an absurd result—one which would "place the parents of children with disabilities in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement." *Frank G.*, 459 F.3d at 372. The Second Circuit's reasoning and holding flow directly from this Court's decision in *Burlington*.

While Petitioner argues that prior public school attendance is a prerequisite to any future private school reimbursement under the IDEA, this assertion runs contrary to the statutory language, the stated goals of Congress, and the interpretation of that language and those goals by this Court.

Section 1412(a)(10)(C) does not state that tuition reimbursement must be denied if a child has not attended public school. Indeed, Petitioner's reading of the statute does not make sense when 1412(a)(10)(C) is read as a whole, including subsections (i)-(iii), and when considered in conjunction with related sections of the IDEA. Numerous courts and the United States Department of Education have

recognized that Section 1412 must be reconciled with the broad remedial language set forth in the remainder of the statute, including Section 1415.[1]

The United States Department of Education—the agency charged with interpreting and enforcing the IDEA—has flatly rejected the interpretation of Section 1412 Petitioner urges here. In its comments to implementing regulations for the provision, the Department of Education notes:

> [h]earing officers and courts retain their authority, as recognized in Burlington and [Carter], to award "appropriate" relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section 615(i)(2)(B)(iii) [Section 1415] in instances in which the child has not yet received special education and related services. This authority is independent of their authority under Section 612(a)(10(C)(ii)[Section 1412] to award

1. *See, e.g. Justin G. ex rel. Gene R. v. Board of Educ. of Montgomery County*, 148 F. Supp. 2d 576, 587 (D. Md. 2001) (holding that "such a construction of the IDEA would produce the absurd result of barring children from receiving a FAPE because their disabilities were detected before they reached school age. [The district's] disturbing interpretation would also place parents of such children in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to reimbursement."); *E.W. and E.W., ex rel. J.W. v. School Bd. of Miami-Dade County Florida*, 307 F. Supp. 2d 1363, 1370 (S.D. Fla. 2004) (holding that "[s]hould Plaintiffs meet their burden of proving that [their child] was denied a FAPE, they should not be prevented from seeking reimbursement under §1412(C)(ii) merely because they refused to place their child, even for a day, in a public school program found to be inappropriate.").

> reimbursement for private placements of children who previously were receiving special education and related services from a public agency.

Committee notes accompanying 34 C.F.R. § 300.403, 64 Fed. Reg. 12601, 12602 (Mar. 12, 1999) (emphasis added).

And Petitioner's reading of the statute is not necessary to give meaning to subsection (ii). Rather, Section 1412(a)(10)(C)(i) is best read as providing that school boards cannot be liable for reimbursement when they have provided FAPE to a child, with clauses (ii) and (iii) clarifying the circumstances under which a subset of children—those who have "received special education and related services under the authority of a public agency"—are eligible for reimbursement.

Petitioner no doubt fears that parents will abuse this process—that parents who never intended to send their children to public schools will be able to obtain reimbursement for private school tuition—and that forcing children to attend public school prior to petitioning for reimbursement of private school costs will prevent such gamesmanship. But Congress does not require children with disabilities to attend public schools. It requires, instead, that all children with disabilities be given a free and appropriate public education, whether that education takes place in a public school or in a private one. Moreover, the IDEA and the case law interpreting it already provide sufficient safeguards against possible abuse of the process.

Under the IDEA, a parent who places his or her child in private school while the appropriateness of a placement is disputed does so at the parent's own financial risk.

Burlington, 471 U.S. at 373-74. If an independent review of the public school placement finds that it did indeed provide FAPE, reimbursement will not be available under the *Carter/Burlington* test. However, no language—statutory, regulatory, or judicial—requires parents who are in the process of disputing inadequate public school placements to place their children in those schools or forfeit a right to reimbursement.

In the twenty years since *Burlington* was decided, and continuing though several amendments to the IDEA—including the 1997 Amendments at issue in this case—courts have consistently held that 20 U.S.C. § 1415 authorizes an equitable remedy of reimbursement, even for children placed in private schools unilaterally, as long as the parents notify the school district that FAPE is at issue and cooperate with the school district's efforts to provide FAPE.[2]

These rulings strongly discourage parents from relying on speculation to arbitrarily reject appropriate placements, and ensure that a school district will not be subject to a reimbursement order where it has been given the opportunity

2. Where a parent fails to provide notice or fails to cooperate with the school board in developing an IEP, courts have appropriately used their equitable powers to deny reimbursement. *See, e.g., Berger v. Medina City School. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003) (holding that "dissatisfied parents were required to complain to the public school to afford the school a chance to remedy the IEP before removing their disabled child from the school"); *M.C. ex rel Mrs. C. v. Voluntown Board of Educ.*, 226 F.3d 60, 68 (2d Cir. 2000) ("[C]ourts have held uniformly that reimbursement is barred where parents unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP."); *M.C. ex rel. Ash v. Lake Oswego School Dist., No. 7J*, 980 F.2d 585, 589 (9th Cir. 1992); *Evans v. District. No. 17*, 841 F.2d 824, 829 (8th Cir. 1988).

to provide—and has provided—FAPE to a child with a disability. Requiring children to attend public school under an inappropriate IEP is both unlawful and unnecessary.

B. There is No Circuit Conflict

Petitioner's argument that this Court's intervention is required to avoid "certain confusion . . . throughout the Circuits," Br. of Pet. at 17, is baseless. The Second Circuit's decision in *Frank G.*, 459 F.3d 356, upon which its summary order in this case relied, is supported by an equally thoughtful opinion from the Eleventh Circuit in *M.M. v. School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006) ("*M.M.*"). Moreover, both of these opinions provide context for, rather than conflict with, the First Circuit's decision in *Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004) ("*Amy N.*"). Therefore, there is no Circuit conflict and no confusion in the lower courts.

1. *Frank G.* (Second Circuit) does not conflict with *Amy N.* (First Circuit)

Petitioner misstates the focus of the First Circuit's analysis in *Amy N.* According to Petitioner, the First Circuit held that "the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) creates a threshold requirement that tuition reimbursement is only available for children who have previously received special education and related services while in the public school system." Br. of Pet. at 16, citing *Amy N.*, 358 F.3d at 159-60.

But the focus of the First Circuit's analysis in *Amy N.* was *notice*, not public school attendance. In that case, the parents "unilaterally removed" Katie from public school and

placed her in private school "without ever before raising with Greenland school officials the issue of special education services for Katie." *Amy N.*, 358 F.3d at 152. As the First Circuit explained, "[t]he point is that there was *no notice at all* to the school system before Katie's removal from Greenland that there was any issue about whether Katie was in need of special education." *Id.* at 160 (emphasis added). The "statutory provisions" of the IDEA, the court found,

> make clear Congress's intent that *before* parents place their child in private school, they must at least *give notice* to the school that special education is at issue. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools.

Id. (emphasis added). The implementing regulations promulgated by the Department of Education, in particular 34 C.F.R. § 300.403, which expressly authorizes unilateral placements in private schools "*when FAPE is at issue*," further reinforce this interpretation because, as the court noted, the applicable CFR provisions "indicate[] that the Department of Education views notice as critically important in the statutory scheme: it is difficult to imagine FAPE being 'at issue' when neither the school nor the child's parents have ever raised the question of FAPE." *Id.* at 161. In announcing its holding, the First Circuit explained that its "conclusion that tuition reimbursement is unavailable [is] due to the parents' lack of notice to the school system while Katie was enrolled there. . . ." *Id.* at 162.

Unlike *Amy N.*, the dispute in this case began when Mr. F. placed the Board on notice that he was seeking FAPE for Gilbert.[3] Similarly, *Frank G.*'s story begins when the appropriate public school district received "notification from Anthony's parents" that FAPE was at issue. *Frank G.*, 459 F.3d at 360. Thus, *notice*, an important part of the First Circuit's decision in *Amy N.*, was not at issue in *Frank G.* Therefore, the Second Circuit had to confront in both cases the school district's assertion that under 20 U.S.C. § 1412(a)(10)(C)(ii) "[o]nly after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement." *Id.* at 367. The Second Circuit properly rejected this absurd result. *Id.* at 372.

In response to the school district's reliance on *Amy N.*, the Second Circuit correctly distinguished that case:

> [*Amy N.*] held only that parents of a learning disabled child, who unilaterally placed their child in a private school without notice to the local educational agency of their child's need for special education and without offering the agency an opportunity to prepare an IEP that is appropriate to the child's needs, were not eligible for tuition reimbursement.

Id. at 374-75. Although the Second Circuit does not endorse all of the First Circuit's statutory analysis in *Amy N.*, it "agree[s] completely with the result reached in [*Amy N.*]." *Id.* at 375.

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3. The factual record in this case is not developed at the federal level because the district court's decision was not based upon a review of the facts. But the Impartial Hearing Officer and the SRO both found that Mr. F. had complied with the notice provisions and that the equities favored reimbursement of Gilbert's Gaynor tuition.

Because *Frank G.* does not conflict with *Amy N.*, there can be no conflict between the First Circuit's decision and the instant case, which relies upon the reasoning of *Frank G.* Like the parents in *Frank G.*, Tom F. notified the Board that FAPE was at issue. Thus, the Board was able "to assemble a team, evaluate [Gilbert], devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools." *Amy N.*, 358 F.3d at 160. After a school district has had the opportunity to prepare an IEP, any parent of a disabled child is well within their rights under the IDEA to challenge the proposed IEP, as Tom F. did in this case.

2. *Frank G.* (Second Circuit) agrees with *M.M.* (Eleventh Circuit)

Petitioner's argument that this Court's refusal to grant certiorari will create "certain confusion . . . throughout the Circuits," Br. of Pet. at 17, is even less convincing in light of the Eleventh Circuit's decision in *M.M.*, 437 F.3d at 1085, which is wholly consistent with the Second Circuit's decisions in *Frank G.* and in this case.

C.M., a disabled child, was enrolled in private school during the development of her IEP. Following her parents' rejection of the proposed IEP, she remained in private school while her parents challenged the public school district's denial of FAPE. The Eleventh Circuit found that C.M.'s participation, prior to entering school, in an early intervention program constituted the receipt of "special education and related services under the authority of a public agency" pursuant to 20 U.S.C. § 1412(a)(10)(C)(ii). *Id.* at 1098.[4]

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4. Respondent argued in both the district court and the Second Circuit, that Gilbert had "previously received special education and

(Cont'd)

In addition, like the Second Circuit, the Eleventh Circuit directly confronted the issue of "whether C.M.'s parents are entitled to any form of reimbursement given that C.M. is currently enrolled in private school and was never enrolled in public school." *Id.* Relying on the reasoning of *Burlington* and its interpretation by other federal courts, the Eleventh Circuit found that

> forcing parents into accepting inadequate IEPs in order to preserve their right to reimbursement runs contrary to the rights recognized in the *Burlington* line of cases. Therefore, we conclude that parents are not required in all cases to first enroll their

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(Cont'd)

related services under the authority of a public agency." Gilbert was evaluated by the Board's representatives in 1997, 1998, and 1999, and the Board proposed an IEP for Gilbert in each of those years. The IDEA's implementing regulations support this position. 34 C.F.R. § 300.24 lists several illustrative examples of "related services," including: "early identification and assessment of disabilities in children," "medical services for diagnostic or evaluation purposes," "parent counseling and training"—which is in turn defined as "providing parents with information about child development" and "helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP"—and "psychological services," which is interpreted to include "administering psychological and educational tests, and other assessment procedures" and "interpreting assessment results." 34 C.F.R. § 300.24. As this Court has noted, Congress "envision[ed] the IEP as the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). Thus, although the Second Circuit did not reach this argument, it is clear that the provision of and annual review of an IEP qualifies as "special education and related services" under the IDEA and its accompanying regulations.

> child in public school pursuant to an inadequate IEP in order to preserve their right to reimbursement.

Id. at 1099.

Thus, in *M.M.* the Eleventh Circuit reached the same result as the Second Circuit did in *Frank G.* and *Tom F.*—children with disabilities who are denied FAPE by their local public school district are *not* required to acquiesce to an inadequate public school placement in order to later obtain reimbursement for an appropriate special education at a private school, and are not categorically barred from receiving tuition reimbursement solely because they never attended a public school.

This Court has discretion to exercise its certiorari jurisdiction and to provide guidance to the lower federal courts where there is a conflict in the Circuits. Petitioner, seeking to convince this Court to grant its petition for a writ of certiorari, sees conflict where there is none. The Second Circuit's decision in *Frank G.*, and therefore its decision in this case, does not conflict with the First Circuit's decision in *Amy N.* Moreover, *Frank G.* is entirely consistent with the Eleventh Circuit's decision in *M.M.* Because there is no conflict among these decisions, the Court should deny the petition.

C. This Case is an Improper Vehicle for Supreme Court Review

The Second Circuit decided this case by summary order, declaring that "the judgment of the district court be, and it hereby is, VACATED and REMANDED for further proceedings in light of this Court's decision in *Frank G. v. Board of Educ.*, No. 04-4981, __ F.3d __ (2d Cir. July 27, 2006)." *Tom F.*, 2006 U.S. App. LEXIS 20961. Under the local rules of the Second Circuit,

this decision has no precedential effect. *See* Second Circuit Local Rule 0.23(b) ("Rulings by summary order do not have precedential effect."). Because no court may rely upon this decision, it cannot form the basis for a conflict among the Circuits, and therefore there is no "compelling" reason for this Court to grant certiorari.

The District Court, the proper locus of factual inquiry, should be allowed to consider the facts of this case "in light of [the Second Circuit]'s decision in *Frank G. v. Board of Educ. . . . .*" *Id.* As this Court has noted when discussing its own summary dispositions, this particular form of resolution can leave important questions "lurk[ing] in the record," inadequately presented and ultimately unresolved. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

The District Court decided this case as a matter of law, declining to examine the evidentiary record that was considered by both the Impartial Hearing Officer and the SRO. Thus, the District Court did not consider or apply the three prongs of the *Carter/Burlington* test—it did not consider whether Petitioner offered Gilbert an appropriate placement that would provide him with FAPE; it did not consider whether Gaynor was an appropriate placement for Gilbert; and it did not balance the equities to determine whether or not Mr. F. was entitled to reimbursement. *See generally Carter*, 510 U.S. at 12-13; *Burlington*, 471 U.S. at 370 (providing the structure for this analysis).

The District Court, not this Court, is the proper forum for consideration of the particular facts of this case "in light of [the Second Circuit]'s decision in *Frank G. v. Board of Educ. . . . ,*" *Tom F.*, 2006 U.S. App. LEXIS 20961, at *1, and under the *Carter/Burlington* framework.

D. Petitioner's Spending Clause Argument is Waived Because it Was Not Raised Below and is Meritless

Petitioner's brief asserts, without explanation, that "the Second Circuit's decision is inconsistent with this Court's decision in *Arlington Central School District Board of Education v. Murphy*, __ U.S. __, 126 S. Ct. 2455 (2006)." Br. of Pet. at 19. To the extent that Petitioner relies on *Arlington* to argue that the IDEA's genesis under the Spending Clause must influence the outcome of this dispute, this argument was not raised below, and Petitioner has forfeited it. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."); *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001) (declining to reach question "not raised or briefed below"). Moreover, for this point of law, *Arlington* relied on this Court's decision in *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005) ("*Schaffer*"). *Schaffer* was available to Petitioner during the pendency of its appeal to the Second Circuit, but Petitioner did not bring it to the attention of that court.

Even if this Court were to consider Petitioner's argument, *Arlington* does not support Petitioner's asserted position. In *Arlington*, this Court held that the statutory language of 20 U.S.C. § 1415(i)(3)(B), a fee-shifting provision of the IDEA, did not provide sufficiently clear notice to state officials "engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds," that states could be potentially liable upon losing an IDEA litigation not only for attorney's fees, but expert witness fees as well. 126 S. Ct. at 2459.

The key question in *Arlington* was "whether the IDEA furnishes clear notice regarding the liability at issue. . . ." *Id.* Petitioner's assertion that "the Second Circuit's decision is inconsistent with [that rule]," Br. of Pet. at 19, is incorrect.

The IDEA makes clear to educational authorities that, where an authority fails to provide FAPE to a child with a disability, it may be liable for that child's private-school tuition. *See* 20 U.S.C. § 1412(a)(10)(C) ("a court or hearing officer may require the agency to reimburse the parents for the cost of that [appropriate private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child. . . ."). Well-established precedent confirms that obligation—beginning with *Carter* and *Burlington*—and continuing through scores of other cases over two decades. Accordingly, school districts have had ample notice of their obligations in this regard. There is simply no basis for Petitioner's argument that the statute fails to put officials on notice of their obligations.

As this Court noted over twenty years ago, "[t]he [IDEA] contemplates that [special] education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools *at public expense* where this is not possible." *Burlington*, 471 U.S. at 369 (emphasis added).

Given the clear statutory language confirmed by this and other courts, Petitioner cannot argue that it did not have sufficiently clear notice that where it failed to provide FAPE it could be potentially liable for private school costs. Thus, Petitioner's reliance on *Arlington* is both ill-timed and unconvincing.

CONCLUSION

Based upon the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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